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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1944.

No. 200.

ORDER OF RAILWAY CONDUCTORS OF AMERICA; H. W. FRASER  
AS PRESIDENT OF THE ORDER OF RAILWAY CONDUCTORS  
OF AMERICA, ET AL., *Petitioners*;

v.

THE PENNSYLVANIA RAILROAD COMPANY AND BROTHERHOOD  
OF RAILROAD TRAINMEN, *Respondents*.

On Petition for a Writ of Certiorari to the United States  
Court of Appeals for the District of Columbia.

**REPLY BRIEF FOR PETITIONERS.**

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## INDEX.

	Page
Argument .....	1
I. The <i>Switchmen's Union</i> case .....	1
II. The <i>M-K-T</i> and <i>Southern Pacific</i> cases .....	7
III. The <i>Railway Clerks</i> and <i>Virginian Railway</i> cases .....	9
IV. The Board as an indispensable party .....	12
V. Petitioners' standing to complain .....	13

## TABLE OF CASES:

General Committee v. M-K-T R. Co., 320 U. S. 323 .....	7, 11
General Committee v. Sou. Pac., 320 U. S. 338 .....	7
Switchmen's Union v. Board, 320 U. S. 297 .....	1
Texas & N. O. R. Co. v. Ry. Clerks, 281 U. S. 548 .....	6, 9
Virginian Ry. v. Federation, 300 U. S. 515 .....	9, 11

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**REPLY BRIEF FOR PETITIONERS.**

In opposing the petition for a writ of certiorari, Respondents have advanced several arguments to which Petitioners reply as follows:

**ARGUMENT.**

**I.**

**The Switchmen's Union Case.**

Pennsylvania has endeavored to establish that the case at bar parallels the case of *Switchmen's Union v. Board*, 320 U. S. 297, and that the federal courts are without power to entertain the instant case for the same reason they were

held to have no jurisdiction over the subject matter involved in the *Switchmen's Union* case. (Penna. br. 7-13) BRT has advanced a similar argument. (BRT br. 9-12)

The *Switchmen's Union* case, Pennsylvania points out, involved a suit to enforce the right guaranteed by Section Fourth, of the Act; and this Court held the Federal courts to be without power to enforce the right for the reason "that Congress had delegated to the Board the task of protecting the 'right' of employees embodied in Section 2, Fourth, of the Act; and, since Congressional specification of one method for the protection of a right normally excludes other methods, it is to be assumed that Congress did not contemplate judicial review." (Penna. br. 8) Pennsylvania contends that for the same reason the Federal courts are without power to entertain the instant case—that this is a suit to enforce the right guaranteed by Section 2, Third, of the Act, and Congress confided to the Board the power to enforce that right when it adopted the following provision into the Act as a part of Section 2, Ninth:

"In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier."

It is said that this specification by Congress of one method for protecting the right excludes other methods—that the Board's enforcement power is exclusive.

Petitioners could agree with this argument but for one circumstance, the existence of which Pennsylvania has sought to conceal under a canopy of statements which contradict facts disclosed by the record before this Court. The circumstance referred to is the Board's asserted view that the Railway Labor Act does not vest it with a power to

protect the right guaranteed by Section 2, Third, from acts of carrier interference which occur *prior* to the actual conduct of a representation election, but merely empowers it to protect the right from acts of carrier interference which occur *during* the progress of a representation election. The Board so defined its power in the following ruling issued during the early stages of this controversy:

"The contentions which you make regarding the carrier's influence arise out of circumstances antedating the Board's investigation of this case which was begun on November 2, 1942, circumstances in respect of which the Mediation Board possesses no jurisdiction. Our power in such matters is to insure that during the time of taking a secret ballot or in exercising other methods of ascertaining the choice of representatives, the employees shall be free from interference, influence or coercion by the carrier. This, the Board can and will do within a prescribed area, if, and when, an election is being held." (R. 38-39)

In its amended answer the Board defended and reiterated this view:

"In answer to paragraph 44 of the complaint, these defendants deny that the said election and the certification are illegal, null and void; they deny that the Board, in not determining whether the labor practices charged to the Pennsylvania Railroad would interfere

<sup>1</sup> The Court of Appeals summarized the Board's interpretation of its power under Section 2, Ninth, as follows:

"The Board \* \* \* insisted it had no jurisdiction \* \* \* except as to coercion, threatened or practiced, while an election is in progress." (R. 114)

<sup>2</sup> Paragraph 44 alleges that the Board failed and refused to exercise the duty, and unlawfully exercised the power, vested in it by Section 2, Ninth, when, without first investigating or considering ORC's charges that Pennsylvania and BRT had collaborated in interfering with the conductors' choice of a representative, it held an election among the conductors and certified the winner thereof as the conductors' representative, and that the election and certification are therefore illegal and void. (R. 19-20)

with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative was failing to perform its statutory duty: \* \* \* For further answer these defendants allege: That the Board determined \* \* \* that the instant charges did not allege carrier coercion directly affecting and occurring during the actual conduct of the election and that the Board therefore, as a matter of law, had no jurisdiction to consider the validity of these charges on the merits \* \* \* " (R. 73-74)

While Petitioners disagree, as did the Court of Appeals,<sup>3</sup> with the Board's definition of the power delegated to it by Section 2, Ninth, there is no denying that the definition is immune to challenge in the courts, for, as Mr. Justice Reed pointed out in his dissenting opinion, the *Switchmen's Union* decision "leaves the interpretation of the authority granted by Section 2, Ninth, finally to the Board" (320 U. S. 311). This being the case, Pennsylvania's argument that the federal courts have no power to entertain this suit to enforce the right guaranteed by Section 2, Third, because Section 2, Ninth, delegates to the Board the power to protect this right and this "Congressional specification of one method for the protection of the right excludes other methods" (including the judicial enforcement method), is unsound. It is unsound because the right guaranteed by Section 2, Third, can be violated by acts of carrier interference occurring *prior* to the holding of a

<sup>3</sup> The Court of Appeals said:

"When the right of [ORC] to continue to represent Road conductors was challenged by [BRT] and it was charged that there was collusion between [BRT] and the Railroad, with the purpose of influencing the electors in casting their ballots, we think the Board should have investigated the charge before calling or holding an election. This seems to us to follow from the provisions of the Section of the Act under which the Board is required to function. The Board's justification that jurisdiction to police the election was confined to the event itself, and not the circumstances leading up to it, does not appeal to us. See *Texas & N. O. R. R. Co. v. Brotherhood &c.*, 281 U. S. 548." (R. 114-115)



representation election as well as by acts of carrier interference which occur *during* the progress of a representation election,<sup>4</sup> and since the Board's power to protect the right is limited to acts which occur *during* an election, *no method* has been specified by Congress for protecting the right from acts of carrier interference which occur *prior* to an election; obviously, therefore, the principle that "Congressional specification of one method for the protection of a right normally excludes other methods," is not apposite in the instant case.

Pennsylvania has sought to escape the coils of this reasoning by representing to this Court that the Board declined to take action on ORC's charges of carrier interference and influence (i.e., the Board declined to postpone the election); not because it believed that it lacked the power to consider charges of carrier interference antedating an election, *but because it determined, on the basis of the facts underlying ORC's charges, that those charges were groundless.* Pennsylvania has asserted:

"Finally, it should be noted that in this case, as in the *Switchmen's Union* case, the Board was fully aware of the facts on the basis of which its certification is attacked. The [ORC] brought to the attention of the Board the charges of interference and coercion on the part of the Railroad. Those charges were before the Board when it issued its certification and, accordingly, the certification must be taken as a determination of the entire representation dispute including the allegations of carrier coercion." (Penna. br. 9)

<sup>4</sup> The proposition that carrier conduct antedating the holding of an election can constitute "carrier interference and influence" within the meaning of Section 2, Third, has not been denied by either of the Respondents but has, in fact, been tacitly conceded by both of them. For this reason, the wealth of authority available to support the proposition will not be set forth at this stage of the proceedings before this Court.

<sup>5</sup> In a footnote to these statements Pennsylvania says that the Board, in its brief on the merits of the appeal in the Court of Appeals,

The instant case is before this Court on a record which does not support, but unequivocally contradicts, these assertions. Its amended answer makes clear beyond doubt that the Board was *not* "fully aware of the facts" on which ORC's charges are based, and that the Board did *not* determine that those charges were groundless. The Board's amended answer denies

"that the Board, in not determining whether the labor practices charged to the Pennsylvania Railroad would interfere with, influence or coerce the craft or class of road conductors in their choice of a bargaining representative, was failing to perform its statutory duty;

\* \* \* For further answer these defendants allege: \* \* \* that the instant charges did not allege carrier coercion directly affecting and occurring during the actual conduct of the election and that the Board therefore, as a matter of law, had no jurisdiction to consider the validity of these charges on the merits; \* \* \* *that the Board has not passed upon and is not authorized to pass upon the validity of these charges on the merits* \* \* \* (Italics supplied)" (R. 73-74)

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"stated that another reason for its rejection of the [ORC's] charges was that those charges, even if true, did not set forth a case of carrier coercion or interference relating to the designation of a representative by the employees." (Penna. br. 9)

The only facts to be taken into account in considering whether a writ of certiorari should issue in this case are the facts disclosed by the record before this Court. Statements in the brief filed by the Board in the Court of Appeals which are not supported by the record, cannot properly be employed by Respondents in opposing the petition for a writ of certiorari.

<sup>6</sup>The above excerpt from the Board's amended answer deletes a statement in which the Board and its members "deny that the practices complained of constitute in fact unlawful coercion." This statement, if should be noted, denies merely that the practices charged did not constitute "coercion"; it does not deny that those practices constituted "interference" or "influence." That the three terms "coercion," "interference" and "influence," as used in Section 2, Third, of the Railway Labor Act, have different meanings, is well-recognized: See *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, 568.



Pennsylvania, it is submitted, has failed in its attempt to establish that under the *Switchmen's Union* decision the federal courts have no jurisdiction to entertain the instant case and that therefore this case presents no question not already set at rest by this Court.

## II.

### The M-K-T and Southern Pacific Cases.

In an attempt to assimilate the instant case to *General Committee v. M-K-T R. Co.*, 320 U. S. 323, and *General Committee v. Sou. Pac.*, 320 U. S. 338, Pennsylvania has advanced the argument that the case involves merely a "jurisdictional dispute." (Penna. br. 14-17).

This argument is predicated upon what Pennsylvania insists is the gist of Petitioners' amended complaint:

"The petitioners' charges of coercion and influence on the part of the railroad *are based entirely* upon alleged violations of the petitioners' so-called bargaining rights." (Italics supplied) (Penna. br. 6)

It is reasoned from this premise that a decision whether Pennsylvania did coerce and influence the road conductors in their choice of a representative, as Petitioners charge, would necessitate a determination of the boundaries of ORC's jurisdiction as the conductors' representative, and that the Supreme Court ruled in the *M-K-T* and *Southern Pacific* cases, *supra*, that the federal courts have no power to make such a determination.

A fatal weakness of this argument is that it proceeds from a false premise—the premise that Petitioners' charges of carrier interference "are based *entirely*" upon alleged violations of ORC's jurisdictional rights as the conductors' bargaining agent.

It is quite true that the amended complaint contains several allegations the thesis of which is that Pennsylvania interfered with the conductors' choice of a representative by deliberately encroaching upon ORC's bargaining jur-

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isdiction, but it also contains several allegations charging that Pennsylvania interfered with the conductors' choice in other and devious ways. It is alleged that Pennsylvania and BRT conspired in an unlawful plan of action designed to weaken ORC and strengthen BRT in their respective standings with the conductors and thereby to interfere with and influence the conductors in their choice of a representative (R. 14, para. 25), and that Pennsylvania, in pursuance of this plan and

"in an effort to promote good will toward the BRT and weaken and discredit the ORC, sought to bring about a settlement of all claims filed by the BRT before the First Division of the National Railway Adjustment Board, and published and gave wide circulation to its proposed settlement \* \* \* (R. 15, para. 28);

that Pennsylvania

"agreed to the said unlawful plan of action or program \* \* \* to secure a commitment from the BRT to adjust time claims of road brakemen, pending before the First Division of the National Railway Adjustment Board, at greatly reduced amounts" (R. 16-17, para. 33);

and that, in pursuance of the aforementioned plan, Pennsylvania

"has engaged in dilatory tactics, has failed and refused to bargain and negotiate in good faith with ORC, \* \* \* and is intentionally delaying negotiations with ORC to grant the BRT an opportunity to invoke the services of the Board under the provisions of the Railway Labor Act for a certification to represent the class or craft of road conductors and to obtain an election in such class or craft at a time when the working conditions of the conductors are in a state of uncertainty; and that the unlawful failure and refusal of the Penn RR to bargain and negotiate is embarrassing the ORC with its members." (R. 15-16, para. 29)

It is plainly evident that a court, on the trial of the instant case, would not have to determine the scope of ORC's jurisdiction as the road conductors' representative in order to decide whether petitioners had proved that Pennsylvania engaged in the conduct charged to it in the above-quoted allegations or in order to decide whether such conduct constituted carrier interference within the meaning of Section 2, Third, of the Act. Petitioners' charges of carrier interference are *not* "based entirely upon alleged violations of ORC's bargaining rights," therefore, and Pennsylvania's argument that the instant case involves no justiciable issue, is erroneous.

### III.

#### The Railway Clerks and Virginian Railway Cases.

Petitioners contend in the brief filed with and in support of their petition for a writ of certiorari that the decision of the Court of Appeals in the instant case is contrary to this Court's decisions in *Texs. & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548, and *Virginian Ry v. Federation*, 300

It is clear that the quoted allegations are of such scope that on the trial of this case Petitioners could properly prove that Pennsylvania engaged in conduct which would constitute "carrier interference and influence" within the meaning of Section 2, Third, of the Act. This point will not be elaborated upon at this stage of the proceedings before this Court, and it will suffice to state here that proof of the allegation that Pennsylvania refused to bargain in good faith with ORC as the recognized representative of the road conductors regarding the rates of pay and working conditions, would prove that Pennsylvania had violated the conductors' right to a free choice. The District Court in the *Virginian Railway* case determined that the defendant Railway had violated Section 2, Third, stating:

"This unlawful interference and purpose to influence its employees has been evidenced chiefly through activities of the Railway in creating and promoting so-called independent organizations, both before and since the election and *by its fixed determination not to recognize or treat with the chosen representatives of the crafts unless they come from an organization under its control.*" (Italics supplied) (11 F. Supp. 621, 633)

U. S. 515, for the reason that in the *Railway Clerks* case this Court held that the federal courts have power to enforce Section 2, Third, and in the *Virginian Railway* case this Court indicated that the earlier holding remains in full force and effect. Respondents have advanced a novel argument to support the contrary view. (Penna. br. 8-11; BRT br. 16-21)

The *Railway Clerks* case, wherein the Supreme Court held Section 2, Third, of the Railway Labor Act of 1926 to be judicially enforceable, is said to provide no support for Petitioners' contention that the federal courts have power to entertain the instant suit to enforce Section 2, Third, of the Act as it now stands, for the reason that Section 2, Ninth, which was adopted into the Act by amendment in 1934, ousted the federal courts of their jurisdiction to enforce Section 2, Third, and conferred upon the Board the exclusive power of enforcement.

The *Virginian Railway* case is said to have "no application here because it dealt solely with a provision of the Act for which no means of enforcement, either administrative or judicial, was provided by Congress" (the provision in Section 2, Ninth, that the carrier shall "treat with" representatives certified by the Board). (Penna. br. 10)

The view that a 1934 amendment of the Railway Labor Act "reversed" the celebrated *Railway Clerks* decision, is believed unsound for the following reasons:

(1) The legislative history of the 1934 amendments to the Act is barren of even an intimation that, in enacting Section 2, Ninth, into the Act, Congress intended to transfer to the Board the power which had been held in the *Railway Clerks* case to repose in the federal courts. This silence suggests that such was not the Congressional intendment.

(2) Respondent's view is inconsistent with the view of this Court as expressed in the *Virginian Railway* case, which involved the Act as amended in 1934. In that case the present Chief Justice, after noting that the petitioner was

not challenging that part of the district court's decree which enjoined the petitioner from interfering with the free choice of representatives by its employees, stated:

"That contention is not open to it in view of our decision in the *Railway Clerks* case, *supra*, and of the unambiguous language of §2, Third and Fourth, of the Act, as amended." (300 U. S. 544)

(3). Further, Respondents' view is believed incompatible with Mr. Justice Douglas' treatment of the *Railway Clerks* and *Virginian Railway* cases in his opinions in *Switchmen's Union v. Federation, General Committee v. Son. Pac.* and *General Committee v. M-K-T R. Co.*, *supra*. Mr. Justice Douglas' references to those cases are discussed at pages 15 and 16 of the brief filed with and in support of the petition for a writ of certiorari. In addition to what is there said, Petitioners would call attention to the fact that in the *M-K-T* case Mr. Justice Douglas, after quoting from the opinion in the *Railway Clerks* case, stated:

"Thus what had long been a 'right' of employees enforceable only by strikes and other methods of industrial warfare emerged as a 'right' enforceable by judicial decree."

And immediately following this observation, he stated that

"Further protection was accorded that right by the amendments which were added in 1934. Thus § 2, Ninth, provided machinery strengthening the representation provisions of the Act." (Italics supplied) (320 U. S. 330)

These remarks seem susceptible of but one construction: that the enforcement power which was held in the *Railway Clerks* case to repose in the courts, was supplemented, and not displaced, by the adoption of Section 2, Ninth, into the Act.



## IV.

**The Board as an Indispensable Party.**

As a further reason why a writ of certiorari should not issue in this case, Pennsylvania has argued that Petitioners' failure to protest the Court of Appeals' decision in dismissing the appeal as to the Board precludes the granting of the relief which is being sought (the setting aside of the Board's certification of BRT as the road conductors' representative). (Penna. br. 12-16)

One ground on which Pennsylvania seems to base this argument is that Petitioners are urging that the certification should be set aside because the Board, in issuing it, improperly discharged its duties under Section 2, Ninth. Such is not the case. Petitioners do not question the propriety of any action or inaction on the part of the Board; rather, Petitioners are contending that Pennsylvania, in collaboration with BRT, violated the conductors' right to a free choice in the selection of a representative, and that the only relief which will vindicate the conductors' right to a free choice is the restoration of the parties to the positions they were in when the right was violated.

The alternate ground on which Pennsylvania concludes that the relief sought in this case cannot be granted is

"If the federal courts do not have the power to set aside a certification of the Board in a proceeding to which the Board is a party, it follows *a fortiori* that the certification cannot be nullified in a proceeding to which the Board is not a party." (Penna. br. 12)

The fact that the Board was a party to the *Switchmen's Union* case, and the fact that the federal courts had no power to set aside the certification involved in that case, do not compel the conclusion that in a suit to which the Board is not a party the federal courts have no power to set a certification aside. Pennsylvania apparently misunderstands the *Switchmen's Union* decision. That decision did not sanctify certifications as such. This Court



held in the *Switchmen's Union* case that the federal courts have no power to consider or decide whether the Board has properly performed the duties imposed upon it by Section 2, Ninth, and that, therefore, the federal courts cannot annul a certification on the ground that the Board has improperly performed its duties under Section 2, Ninth. Petitioners do not urge in this case that the courts should set aside the certification because the Board improperly discharged its duties under Section 2, Ninth. Petitioners are urging that the certification should be set aside because Pennsylvania, in collaboration with BRT, violated the conductors' right to a free choice. Petitioners are seeking judicial enforcement of a right which the Board declares it has no power to enforce.

In this connection it should be observed that the Board itself has conceded that its certification may be set aside on proof that, prior to the holding of the election, Pennsylvania engaged in conduct which interfered with the conductors' choice of a representative. In its amended answer the Board asserted that it had lacked the power to consider ORC's charges of carrier interference antedating the election and that the certification could not be set aside on the ground that the Board had failed to perform its duties when it refused to consider those charges. But the Board further said that the District Court had

"jurisdiction to consider the validity of these charges on the merits on evidence *de novo* \* \* \* [and that the Board] would stand neutral \* \* \* with respect to such issues." (R. 74)

## V.

### Petitioners' Standing to Complain.

Pennsylvania also has made much of the point that Petitioners have no standing in court to prosecute the instant suit. (Penna. br. 17-19)

Pennsylvania explains that the right created by Section 2, Third, is guaranteed to "employees," and is enforceable.

only at the instance of the employees themselves or their designated representative. None of the individual Petitioners, it is said, are "employees," and it is argued that Petitioner-ORC is no longer the designated representative of the employees here involved.

This argument assumes its own conclusion. If the federal courts do not grant the relief sought in this case, i.e., do not restore the parties to the positions they were in at the time Pennsylvania violated Section 2, Third, the argument that ORC is no longer the designated representative of the employees involved, will be unassailable; however, if the relief sought is granted, ORC will be restored as the representative of the employees here involved. Thus, the view that Petitioner-ORC has no standing to prosecute this suit assumes the conclusion that the relief sought never will be granted.

### CONCLUSION.

It is respectfully submitted that, for the reasons set forth in the petition, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the District of Columbia entered in this cause.

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